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MAY 08 2019

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NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

ROBERT DAVID KATZ and
ROSLYN SOUDRY KATZ,

Debtors.

Case No. 2:19-bk-10596-RK

Chapter 11

**MEMORANDUM DECISION ON
DEBTORS' MOTION FOR: (1) STAY
PENDING APPEAL; OR
(2) RECONSIDERATION OF ORDER
GRANTING, IN PART, AND DENYING, IN
PART, MOTION OF CREDITOR MICHAEL
CASSELL FOR RELIEF FROM THE
AUTOMATIC STAY**

Date: May 8, 2019
Time: 11:00 a.m.
Place: Courtroom 1675
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

This bankruptcy case came on for hearing on May 8, 2019 before the undersigned United States Bankruptcy Judge on the motion of Debtors Robert David Katz and Roslyn Soudry Katz ("Debtors") for stay pending appeal or reconsideration ("Motion"), Electronic Case Filing Number ("ECF") 111, of order granting, in part, and denying, in part, motion of Creditor Michael Cassell ("Creditor") for relief from the automatic stay. Victor A. Sahn, of

1 the law firm of SulmeyerKupetz, APC, appeared for Debtors, and Ami Meyers, of the Law
2 Office of Ami Meyers, appeared for Creditor.

3 Debtors seek stay of this court's order granting, in part, and denying, in part,
4 Creditor's motion for relief from the automatic stay filed and entered on April 24, 2019,
5 (the "Stay Relief Order") ECF 107. The Stay Relief Order lifted the automatic stay to
6 permit Creditor to proceeding with his action in state court to confirm an arbitration award
7 in his favor against Debtors, but not permitting enforcement of any such award or
8 judgment against Debtors or against the bankruptcy estate.

9 **A. Stay Pending Appeal**

10 A stay pending appeal is not a matter of right, but instead is an exercise of judicial
11 discretion dependent upon the circumstances of the particular case. *Lair v. Bullock*, 697
12 F.3d 1200, 1203 (9th Cir. 2012) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)). The
13 court considers four factors in exercising such judicial discretion: "(1) whether the stay
14 applicant has made a strong showing that he is likely to succeed on the merits;
15 (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of
16 the stay will substantially injure the other parties interested in the proceeding; and
17 (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d at 1203 (quoting *Nken v.*
18 *Holder*, 556 U.S. at 434). The first two of these factors, likelihood of success on the
19 merits and irreparable injury, "are the most critical." *Lair v. Bullock*, 697 F.3d at 1204
20 (quoting *Nken v. Holder*, 556 U.S. at 434).

21 The decision to grant or deny relief from the automatic stay is committed to the
22 sound discretion of the bankruptcy court and is a final order reviewable on appeal under
23 the abuse of discretion standard. *In re Conejo Enterprises, Inc.*, 96 F.3d 346, 351 (9th
24 Cir. 1996) (citations omitted). Decisions committed to the bankruptcy court's discretion
25 will be reversed only if based on an erroneous conclusion of law or when the record
26 contains no evidence on which the bankruptcy court rationally could have based that
27 decision. *Id.* (citation omitted).

1. Likelihood of Success on the Merits

In order for Debtors to satisfy the first factor for stay pending appeal, that is, likelihood of success on the merits, they must "at a minimum" show that there is a "substantial case for relief on the merits." *Lair v. Bullock*, 697 F.3d at 1204 (citation omitted). In reaching its decision to grant stay relief, in part, the court relied upon the permissive abstention factors and related stay relief factors set forth by the Ninth Circuit in *In re Tucson Estates, Inc.*, 912 F.2d 1161, 1167 (9th Cir. 1990), and stated its application of these factors to the record before the court as set forth on the record during the hearing. Debtors have their own formulation of the *Tucson Estates* factors with which the court does not agree as they set forth in their surreply to the motion. While the court remains of the view that Debtors cannot show that "success is more likely than not" on their appeal, this factor does not require such a showing. In the court's view, it is not likely that Debtors will prevail on appeal because the court's exercise of judicial discretion based on the *Tucson Estates* factors was correct, but the court considers Debtors have more than "a mere possibility of relief" on their appeal and that their prospects are more than *de minimis*, so that it can be said that "serious legal questions are raised" by the appeal. Accordingly, the court determines that this factor supports granting stay pending appeal.

2. Irreparable Injury to Moving Party

Debtors must also show the existence of the second critical factor for stay pending appeal, that is, whether they would be irreparably injured absent a stay. Debtors argue that they would suffer irreparable injury absent a stay because their appeal would be rendered equitably moot if the state court action proceeds and Creditor's arbitration award is confirmed. Debtors argue that confirmation of the arbitration award would "materially and adversely" affect their legal rights because the confirmation of the arbitration award would elevate the status of the award from having the same force and effect as a contract to the force and effect of a state court judgment. In this court's view, this would not be irreparable injury for three reasons: (1) regardless of whether Creditor's claim is based on the status of the arbitration award as unconfirmed or confirmed, the claim is still a general

unsecured claim whose treatment would be the same in a Chapter 11 reorganization case; (2) Debtors are accorded due process of law as they have the right to defend and be heard by the state court on Creditor's petition for confirmation of the arbitration award, it is not a foregone conclusion that the state court will confirm the award and either side has the opportunity for appellate review in the state court system on the confirmation decision; and (3) California case law indicates that the arbitration award, confirmed or not, would be entitled to same res judicata or collateral estoppel effect under California law, *Thibodeau v. Crum*, 4 Cal.App.4th 749 (1992); *State Farm Mutual Automobile Insurance Co.*, 211 Cal.App.3d 5 (1989); see also Witkin, *California Procedure*, Proceedings Without Trial, § 562 (5th ed. 2019 online ed.).¹ Because Debtors have thus made an insufficient showing of irreparable injury, the court determines that this factor supports denial of a stay pending appeal.

3. Substantial Injury to Interested Parties

In considering the third factor of whether issuance of the stay will substantially injure the other parties interested in the proceeding, the court does not find that a stay pending appeal will substantially injure Creditor as the other parties interested in the proceeding. The only prejudice to Creditor is the delay from adjudication of his petition to have the state court rule upon his petition to confirm the arbitration award under California Code of Civil Procedure § 1287.4. Most likely, such delay will not be long because the district court is expected to resolve the appeal expeditiously. Accordingly, the court determines that this factor supports granting a stay pending appeal.

4. Public Interest

As to the fourth factor of the public interest, the court finds that it is not relevant as Debtors admit in their motion for stay pending appeal because only the interests of private

¹ The case relied upon by Debtors, *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817 (9th Cir. BAP 2006), is of limited relevance here because that case involved an arbitration award that was confirmed by a California court and did not present the issue of the effect of an unconfirmed arbitration award.

1 parties are involved in this dispute. The court considers this factor as neutral or not
2 applicable and does not favor or disfavor granting a stay pending appeal.

3 * * *

4 Based on consideration of the four factors for exercising judicial discretion on a
5 motion for stay pending appeal, the court determines that two factors support granting a
6 stay, one factor supports denial of a stay, and one factor is neutral. The two critical
7 factors of likelihood of success on the merits and irreparable injury are divided. Based on
8 these circumstances, including the likelihood that the district court would resolve the
9 appeal expeditiously, the court grants Debtors' motion for stay pending appeal.

10 **B. Reconsideration of Stay Relief Order**

11 Because Debtors filed a notice of appeal of this court's Stay Relief Order on April
12 29, 2019, the pendency of their appeal in the district court deprives this court of subject
13 matter jurisdiction to render a decision that would directly affect the order on appeal
14 before the district court. Therefore, this court lacks jurisdiction to consider their motion for
15 reconsideration of the Stay Relief Order on the merits. *See In re Adams Apple, Inc.*, 829
16 F.2d 1484, 1489 (9th Cir. 1987) (a pending appeal divests a bankruptcy court of
17 jurisdiction).

18 If the court were inclined to reconsider its Stay Relief Order, the court could issue
19 an "indicative ruling" suggesting that the parties that they move the district court for a
20 limited remand of jurisdiction for this court to rule upon the reconsideration motion. *See*
21 *Federal Rule of Civil Procedure 62.1; Federal Rule of Appellate Procedure 12.1; see also,*
22 *Davis v. Yageo Corp.*, 481 F.3d 661, 685 (9th Cir. 2007). However, the court is of the view
23 that its original decision was correct and thus does not suggest that the parties move the
24 district court for a limited remand for the court to rule upon Debtors' reconsideration
25 motion. Accordingly, the court denies the motion for reconsideration for lack of
26 jurisdiction.

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1 Based on the foregoing, the court will grant Debtors' motion for stay pending
2 appeal and therefore will stay enforcement of its order granting in part and denying in part
3 Creditor's motion for relief from the automatic stay pending the outcome of the appeal by
4 Debtors, subject to further order of this court or an appellate court. Debtors are ordered to
5 submit a proposed order consistent with this memorandum decision.

6 IT IS SO ORDERED.

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24 Date: May 8, 2019



Robert Kwan
United States Bankruptcy Judge